

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

THE KRYSTAL COMPANY,
Debtor.

Chapter 11

Case No. 20-61065-PWB
Jointly Administered

OBJECTION TO PROPOSED CURE AMOUNT

COMES NOW, Faith Summerson, Trustee under the Faith Summerson Family Trust (“Landlord”) and files this “Objection to Proposed Cure Amount” (the “Objection”). In support of the Objection, Landlord shows the Court as follows:

INTRODUCTION

The Krystal Company (“Debtor”) filed its “Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases” (the “Cure Notice”) (Doc. No. 310) on April 7, 2020. Landlord and Debtor are parties to an unexpired lease dated January 16, 2013 (the “Lease”) for real property located at 1706 West Fairfield, Pensacola, Florida (the “Premises”).

Debtor has defaulted on the terms of the Lease. To assume the Lease, Debtor must cure the default, compensate Landlord for any actual pecuniary loss resulting from Debtor's default, and provide adequate assurance of future performance under the Lease. 11 U.S.C. § 365(b)(1).

In the Cure Notice, Debtor proposes \$36,780.92 to cure all defaults under the Lease (the “Proposed Cure”). As set forth below, Landlord shows that the Proposed Cure is insufficient to cure Debtor's defaults under the Lease and asserts that Landlord is entitled to a cure, as of April 30, 2020, in the amount of \$58,457.38 pursuant to 11 U.S.C. § 365(b)(1) (the “Total Cure”).

OBJECTION

I. Unpaid pre-petition and post-petition rents.

To cure defaults related to Debtor's pre-petition and post-petition failure to pay rents, Landlord asserts rents in the amount of \$40,350.27. Debtor failed to pay the November and December 2019 and January 2020 pre-petition rent payments in the amount of \$10,037.38 and

the April 2020 post-petition rent payment in the amount of \$10,238.13 as each was due. An additional rent payment will become due on May 1, 2020 in the amount of \$10,238.13. If the May 2020 payment is not timely paid, additional fees and interest will accrue.

In addition to the rents set forth herein, Debtor must pay state taxes to the state of Florida. Landlord reserves its right to amend or supplement this response as required upon notice of Debtor's failure to pay the state taxes due under the Lease.

II. Unpaid property taxes under the Lease.

In addition to the unpaid rents set forth above, to provide a cure of the Lease, Debtor must also pay \$5,953.37 for property taxes paid by Landlord for the Premises. Such amount represents the assessed taxes for 2019. Pursuant to the Lease, Debtor is responsible for paying all property taxes levied against the Premises.

Debtor failed to pay these property taxes as due. As a result, Landlord was forced to remit the payment. Such payment represents funds advanced by Landlord both to protect its interest in the Premises and to preserve the Premises for Debtor's use. These property taxes were due under the Lease, and accordingly, Landlord asserts that Debtor must pay this amount to cure and assume the Lease.

III. Attorney's fees and litigation costs.

Pursuant to the Lease, Landlord is entitled to any and all attorney's fees, paralegal fees, and legal costs and expenses incurred by Landlord, including on appeal and in this or any other bankruptcy proceeding. Landlord has engaged legal counsel in connection with the enforcement of the Lease in this bankruptcy proceeding. Landlord's attorney's fees total \$12,153.74.

IV. Objection / Reservation Re: Adequate Assurance of Future Performance.

The Sale Notice requires contract parties to specify any objection "to the ability of the Successful Bidder to provide adequate assurance of future performance with respect to any Assigned Contract . . ." [Sale Notice, pg. 2]. However, the Debtor has not yet identified a "Successful Bidder," and consequently they have not provided "any" information regarding

adequate assurance of future performance as it pertains to any proposed assumption or assignment of the Lease. It is not the Landlord's obligation to "guess" about a potential buyer's ability to perform. Instead, the Debtor has the burden of proving adequate assurance of future performance.

Accordingly, it is premature to require objections at the present time on the issue of adequate assurance of future performance. As a protective measure, Landlord formally objects to the Sale Notice on grounds that the Debtor has failed to meet their burden of proving adequate assurance of future performance, and Landlord reserves the right to amend or supplement this response as required once a Successful Bidder is identified and such party actually provides the Landlord with financial information pertaining to its ability to perform under the Lease.

CONCLUSION

Landlord objects to any assignment or assumption of the Lease that does not provide for the Total Cure in full at the time of such assignment/assumption pursuant to 11 U.S.C. § 365(b)(1).

WHEREFORE, Landlord prays that this Objection be inquired into by the Court and sustained and that Landlord be granted such other and further relief as may be just and proper.

This 27th day of April, 2020.

JONES & WALDEN LLC

/s/ Leon S. Jones

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CERTIFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing *Objection to Proposed Cure Amount* using the Bankruptcy Court's Electronic Case Filing program, which sends a notice of and an accompanying link to this document to the following parties who have appeared in this case under the Bankruptcy Court's Electronic Case Filing Program:

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This 27th day of April, 2020.

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